

**BEFORE THE HARYANA REAL ESTATE REGULATORY
AUTHORITY, GURUGRAM**

Complaint no. :	2311 of 2021
Date of filing complaint:	16.06.2021
First date of hearing:	30.07.2021
Date of decision :	25.01.2022

1. Mr. Varun Bhardwaj 2. Mrs. Shivani Sangwan Bhardwaj Both R/o: -332-A, Regal Shipra Sun City, Indirapuram, Ghaziabad, U.P- 201014	Complainants
Versus	
M/s Mascot Buildcone Pvt. Ltd. (Hometown Properties Private Limited) Regd. office: 294/1, Vishwakarma Colony, Opposite Lal Kuan, New Delhi	Respondent
CORAM:	
Dr. K.K. Khandelwal	Chairman
Shri Vijay Kumar Goyal	Member
APPEARANCE:	
Shri Sukhbir Yadav	Advocate for the complainants
Shri Rahul Bhardwaj	Advocate for the respondent

ORDER

1. The present complaint has been filed by the complainants/allottees in Form CRA under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for

all obligations, responsibilities and functions to the allottee as per the agreement for sale executed inter-se them.

A. Unit and Project related details:

2. The particulars of the project, the details of sale consideration, the amount paid by the complainants, date of proposed handing over the possession delay period, if any, have been detailed in the following tabular form:

S. No.	Heads	Information
1.	Name and location of the project	"Oodles skywalk", Sector 83, Village sihi, Gurugram
2.	Nature of the project	Commercial complex
3.	Project area	3.0326 acres
4.	DTCP License	08 of 2013 dated 05.03.2013 valid up to 04.03.2017
5.	Name of the licensee	Dharam Singh
6.	RERA registered/ not registered	Registered vide no.294 of 2017 dated 13.10.2017 valid up to 31.12.2019
7.	Date of allotment	26.04.2014 [Page no.20 of the complaint
8.	Date of execution of builder's agreement	30.12.2015 [Page 23 of the complaint]
9.	Date of commencement of construction of the project	21.03.2014 [Page no. 46 of the complaint]
10.	Unit no.	F-113,1st floor [Annexure P-2 at page no. 25 of the complaint]
11.	Super area	289.55 sq. ft.

		[Annexure P-2 at page no. 25 of the complaint]
12.	Payment plan	Construction linked payment plan [Page 75 of reply]
13.	Total consideration	Rs.31,56,095/- [Page 26 of the complaint]
14.	Total amount paid by the complainants	Rs. 29,64,415/- [As alleged by the complainants on page 19 of the complaint and admitted by the respondent in its reply at page no.21]
15.	Due date of delivery of possession <i>(As per clause 38 of the agreement: within 36 months of signing of this agreement or within 36 months from the date of start of construction of the said building whichever is later)</i>	30.12.2018 [Calculated from the date of the signing of this agreement]
16.	Offer of possession	Not received
17.	Occupation certificate	Not offered
18.	Delay in delivery of possession till the date of decision i.e. 25.01.2022	3 years 26 days

B. Facts of the complaint

3. That, believing on representation and assurance of respondent, the complainants Varun Bhardwaj & Shivani Sangwan Bhardwaj, booked one shop bearing no. F - 113 on first floor, admeasuring 289.55 sq. ft. and paid Rs. 7,86,450/- as booking amount and signed a pre-printed application form on 23.04.2013. The shop was purchased under the construction linked plan for a sale consideration of Rs. 31,56,095/-

4. That on 26.04.2014, the respondent issued an allotment letter in name of Varun Bhardwaj & Shivani Sangwan Bhardwaj, conforming to the allotment of shop no. F - 113 on the 1st Floor for size admeasuring 289.55 sq. ft.
5. That after a long follow-up on 30.12.2015, a pre-printed, unilateral, arbitrary shop buyer's agreement was executed inter-se the respondent and the complainants. According to clause 38 of the buyer's agreement, the respondent has to give possession of the said shop within 36 months of the signing of this agreement or within 36 months from the date of start of construction of the said building whichever is later with a grace period of 3 months. It is germane that the construction was commenced on 21.03.2014 (start of excavation) and the builder has taken Rs. 7,76,450/- i.e. 24% of the total cost of the unit, hence, the due date of possession was 21.06.2017 (with 3 months grace period).
6. That on 18.07.2019, the respondent raised a demand of Rs. 5,46,278/- and as per said demand letter the complainants have paid Rs. 27,01,248/- i.e. 85% of the total cost of the unit. That thereafter, the complainants paid an amount of Rs. 2,63,167/- to which the respondent issued the payment receipt for the same on 21.08.2019. therefore till 21.08.2019, the complainants have paid Rs. 29,64,415/- i.e. more than 94% of the total sale consideration.
7. That on 30.03.2021, the complainants sent an email to the respondent and asked to share the latest construction status of the unit and also asked for a copy of the latest statement of account.

thereafter the complainants sent another grievance email to the respondent and stated, "In addition to the status of the project, I would like to know the actual carpet area of my shop". It is pertinent to mention here that the complainants have requested the respondent several times to provide the latest statement of account but till now the respondent has not provided the latest statement of account.

8. That, since 2017 the complainants are regularly contacting the office bearers of the respondent party, as well as sending emails to the respondent, and making efforts to get possession of the allotted shop but all in vain. Despite several visits and requests by the complainants, the respondent did not give possession of the shop. The complainants have never been able to understand/know the actual state of construction. Though the towers seem to be built up, but there was no progress observed on finishing and landscaping work and amenities for a long time.
9. That the main grievance of the complainants in the present complaint is that despite the complainants paid more than 94% of the actual cost of the shop and ready and willing to pay the remaining amount (justified) (if any), the respondent party has failed to deliver the possession of shop on promised time and till date project is without amenities. Moreover, it was promised by the respondent party at the time of receiving payment for the shop that the possession of a fully constructed shop and the developed project shall be handed over to the complainants as soon as construction completes.

10. That the cause of action for the present complaint arose in Dec 2015, when a unilateral, arbitrary, and ex-facie builder buyer agreement was executed between the parties. The cause of action again arose in June 2017, when the respondent party failed to hand over the possession of the shop as per the buyer's agreement. The cause of action again arose on various occasions, including on: a) August 2019; b) Oct. 2020; c) December 2020, d) March 2021; and on many times till date, when the protests were lodged with the respondent party about its failure to deliver the project and the assurances were given by it that the possession would be delivered by a certain time.

C. Relief sought by the complainants:

11. The complainants have sought following relief:
- (a) To get possession of the fully developed/constructed Shop with all amenities within 6 months of the filing of this complaint.
 - (b) To get the delayed possession interest @ prescribed rate from the due date of possession till the actual date of possession (complete in all respect with all amenities after obtaining the OC).
 - (c) To get an order in their favour by directing the respondent party to provide area calculation (carpet area, loading, and super area).
 - (d) To get an order in their favour by restraining the respondent party from charging more than the agreed price.

(e) The complainants are entitled to get an order in their favour to refrain the respondent from giving effect to unfair clauses unilaterally incorporated in the buyer's agreement.

12. On the date of hearing, the authority explained to the respondent/promoter about the contravention as alleged to have been committed in relation to section 11(4)(a) of the Act to plead guilty or not to plead guilty.

D. Reply by the respondent:

13. The respondent has taken grounds for rejection of complaint on the ground of jurisdiction along with reply. The respondent has contested the complaint on the following grounds: -
- (i) That thereafter the complainants vide an application form applied to the respondent for the allotment of a unit in the project. The complainants, in pursuance of the aforesaid application form, were allotted an independent unit bearing no F-113, first floor admeasuring 289.55 sq. ft., in the project vide provisional allotment letter dated 26.04.2014. The respondent had no reason to suspect the *bonafide* of the complainants and proceeded to allot the unit in question in their favor.
- (ii) That it is pertinent to mention that the allotment letter dated 26.04.2014 being the initial document, was just an understanding document, executed between the parties, to be followed by the space buyer agreement, to be executed between the parties. After the signing of the pre-printed application form on 23.04.2013 both the parties fulfilled certain documentation and procedures and

after fulfilling the same, the allotment letter dated 26.04.2014 was issued in favour of the complainants allotting retail space/shop bearing no. 'F-113 on first floor, admeasuring 289.55 sq. ft. Thereafter, on 30.12.2015, the space buyer agreement (SBA) was executed between the complainants and the respondent which contained the final understandings between the parties stipulating all the rights and obligations.

- (iii) That the complainants have no cause of action to file the present complaint as the present complaint is based on an erroneous interpretation of the provisions of the Act as well as an incorrect understanding of the terms and conditions of the space buyer agreement dated 30.12.2015 of the respondent as well as the complainants. It is further submitted that the complainants are an investor and booked the unit in question to yield gainful returns by selling the same in the open market, however, due to the ongoing slump in the real estate market, the complainants has filed the present purported complaint to enjoy wrongful gain from the agreement. The complainants do not come under the ambit and scope of the definition an allottee under section 2(d) of the Act, as the complainants are investors and had booked the unit in order to enjoy the good returns from the project. The complainants are not consumers and an end user since they had booked the Unit in question purely for commercial purpose as a speculative investor and to make profits and gains. The complainants have invested in the unit in question for commercial gains, i.e. to earn income by way of rent and/or re-sale of the property at an appreciated value and

to earn premium thereon. Since the investment has been made for the aforesaid purpose, it is for commercial purpose and as such the complainants are not consumers / end users.

- (iv) It is pertinent to note that the construction of the project was stopped on account of the NGT order prohibiting construction (structural) activity of any kind in the entire NCR by any person, private or government authority. It is submitted that vide order dated 10.11.2016 NGT placed sudden ban on the entry of diesel trucks more than ten years old and said that no vehicle from outside or within Delhi will be permitted to transport any construction material. Since the construction activity was suddenly stopped, after the lifting of the ban it took some time for mobilization of the work by various agencies employed with the respondent.
- (v) That the possession of the unit as per clause 38 of the SBA was to be handed over within 39 months (plus the grace period of 3 months) from the date of the execution of the SBA within an extended period of three months subject to force majeure conditions as mentioned in the agreement. That the complainants, of their own free will and after fully understanding their obligations opted for the purchase of said flat on construction linked plan. Therefore, the date of completion of the project shall be constituted and calculated from the date of execution of the SBA and hence, the date of the completion of the project therefore comes out to be 30.12.2018 (excluding the grace period of 3 months). In addition to this, the date of possession as per the SBA further increased to grace months of 3 months, which comes out to be 30.03.2019. The

date of the completion of the project was further pushed due to the *force majeure* conditions i.e. due to the NGT orders and the lockdown imposed because of the worldwide Covid-19 pandemic, by which the construction work all over the NCR region came to halt. That DTCP, Haryana vide its notification no. 27 of 2021 dated 25.06.2021, gave a relaxation of 6 months to all the builders in view of the hurdles faced by them due to Covid-19. Further to be noted that the country again faced 2nd wave of Covid-19 because of which again a partial lockdown was imposed for a period of two (2) months by the state government which again led to the postponement in the completion of the project. In view of all the above submissions, it is pertinent to mention that the Respondent is on time to complete the said project and is almost on the verge of completion with fit-outs and the finishing of the project in due. The relevant clause stipulating the date of possession shall be calculated from signing of the SBA is being reproduced herein-below for the reference:

"38. The "Company" will, based on its present plans and estimates, contemplates to offer possession of said unit to the Allottee(s) within 36 months (refer cl.37 above) of signing of this Agreement or within 36 months from the date of start of construction of the said Building whichever is later with a grace period of 3 months, subject to force majeure events or Governmental action/inaction. If the completion of ..."

- (vi) That it was not only on account of following reasons which led to the push in the proposed possession of the project but because of other several factors also as stated below for delay in the project:

- a. Time and again various orders passed by the NGT staying the construction.
- b. The sudden surge requirement of labour and then sudden removal has created a vacuum for labour in NCR region. That the projects of not only the respondent but also of all the other developers have been suffering due to such shortage of labour and has resulted in delays in the projects beyond the control of any of the developers.
- c. Moreover, due to active implementation of social schemes like National Rural Employment Guarantee and Jawaharlal Nehru National Urban Renewal Mission, there was also more employment available for labours at their hometown despite the fact that the NCR region was itself facing a huge demand for labour to complete the projects.
- d. Even today in current scenario where innumerable projects are under construction all the developers in the NCR region are suffering from the after-effects of labour shortage on which the whole construction industry so largely depends and on which the Respondent have no control whatsoever.
- e. Shortage of bricks in region has been continuing ever since and the respondent had to wait many months after placing order with concerned manufacturer who in fact also could not deliver on time resulting in a huge delay in project.
- f. In addition, the current government has on 08.11.2016 declared demonetization which severely impacted the

operations and project execution on the site as the labourers in absence of having bank accounts were only being paid via cash by the sub-contractors of the company and on the declaration of the demonetization, there was a huge chaos which ensued and resulted in the labourers not accepting demonetized currency after demonetization.

- g. In July 2017, the Government of India further introduced a new regime of taxation under the Goods and Service Tax which further created chaos and confusion owing to lack of clarity in its implementation. Ever since July 2017 since all the materials required for the project of the company were to be taxed under the new regime it was an uphill task of the vendors of building material along with all other necessary materials required for construction of the project wherein the auditors and CA's across the country were advising everyone to wait for clarities to be issued on various unclear subjects of this new regime of taxation which further resulted in delays of procurement of materials required for the completion of the project.
- h. That it is further submitted that there was a delay in the project also on account of violations of the terms of the agreement by several allottees and because of the recession in the market most the allottees have defaulted in making timely payments and this accounted to shortage of money for the project which in turn also delayed the project.

- i. Then the developers were struck hard by the two consecutive waves of the covid-19, because of which the construction work completely came to halt. Furthermore, there was shortage of labour as well as the capital flow in the market due to the sudden lockdown imposed by the government.
 - j. Lately, the work has been severely impacted by the ongoing farmers protest in the NCR as the farmers protest has caused huge blockade on the highway due to which ingress and egress of the commercial vehicles carrying the raw materials has been extremely difficult, thereby bringing the situation not in the control of the developers and thus constitutes a part of the force majeure.
- (vii) That the respondent shall not be held responsible or liable for not performing of its obligations or undertaking mentioned in this agreement if such performance is prevented, delayed or hindered by act of God, fire flood, explosion, war, riot, terrorists-acts, earth quake, court orders government orders, sabotage, inability to procure or general shortage of energy, labour, equipment, facilities, materials or supplies, failure of transportation, strikes, lock-outs action of labour unions or any other cause (whether similar or dissimilar to the foregoing) not within the reasonable control of the respondent.
- (viii) That the complainants have also misrepresented that no updates regarding the status of the project were provided to him by the respondent. The complainants were constantly provided the

construction updates by the respondent from time to time and were well aware of the force majeure conditions prevailed during the course of time which led in delaying the competition of the said project. That it is submitted that several allottees, have defaulted in timely remittance of payment of installments which was an essential, crucial and an indispensable requirement for conceptualisation and development of the project in question. That despite there being a number of defaulters in the project, the respondent itself infused huge amount of funds into the project and is diligently developing the project in question.

- (ix) It is further pertinent to mention that the project at present date has been completed up to 95% (only fit outs and finishing of the project is due). It is pertinent to note that the project is on time and would be handed over to the allottees within next few months. Therefore, the question of delay possession charges does not arise in this scenario as the respondent is well within the stipulated period of time to finish the project and thus granting any interest for the delay possession charges would set up as a bad precedent. If the conditions of force majeure are excluded from the promised stipulated period of time, the respondent is well within the time schedule to complete the project. Furthermore, almost 90-95% of the firefighting, plumbing, electrical, AC ducting work has been done and the internal finishing work is going on and within few months, the possession would be given to the complainants. It is pertinent to note that granting of the delay possession charges to the complainants by the respondent at this crucial juncture would

bring a bad name to the goodwill of the entire company and will lead to an array of similarly filed frivolous and vexatious complaints asking for a similar relief, which will leave the respondent without any funds to carry on the completion of the project and would further go bankrupt. The respondent itself has infused huge sum of funds into the project so that the project could be completed at the earliest possible time. Despite force majeure conditions the respondent has made all the efforts in order to complete the project in time.

- (x) Further delay in raising construction, if any, is on account of failure of complainants to timely make the payment of the instalments due as per the agreed payment plan and on account of reasons which are covered under clause 38 of the space buyer agreement as force majeure and the parties had clearly agreed that in that case the respondent shall not be held responsible or liable for not performing its obligations or undertaking mentioned in the agreement if such performance is prevented, delayed or hindered by the reasons explained herein below. It is pertinent to mention that the total consideration for the said unit is Rs. 31,56,096/- excluding the GST charges which comes out to be Rs. 32,47,522/- The complainants have only been managed to pay 85% of the total consideration amounting to Rs. 29,64,415/-. The complainants are consistent and perpetual defaulters in the payment of the instalments as the respondent from time to time kept sending the demand letter for remitting the instalments from the complainants. The respondent issued several demand letters to the complainants

to clear the dues. The respondent issued the demand letters dated 09.02.2018, 21.04.2018 and 28.09.2018, which were cleared by the complainants after considerable period of time.

- (xi) That the respondent raised demands from time to time as per the payment plan and did not raise any demand beyond the scope of the payment plan. It is pertinent to mention herein that the complainants herein defaulted in making timely payments to the demands raised by the respondent on achievement of relevant construction milestone and hence was a chronic defaulter.
- (xii) That from the above described conduct it is very much clear that the complainants regularly defaulted in making timely payments in violation of the terms & conditions of the space buyer's agreement which also contributed to shortage of funds for the respondent which further led to delay in construction of flat.
- (xiii) That upon completion of the development, construction and other related works, the buyer will be entitled to take possession of the said flat only after all the amounts payable towards total sale price and other charges and dues or amounts payable under the agreement are paid and the conveyance deed in respect of the said flat is executed and duly registered on the terms and conditions of this agreement except those omitted by the promoter as unnecessary and the terms and conditions, if any, imposed by the authorities in this behalf with the Registrar/Sub-Registrar concerned.

- (xiv) Copies of all the relevant documents have been filed and placed on record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and submission made by the parties.

E. Jurisdiction of the authority:

14. The plea of the respondent regarding rejection of complaint on ground of jurisdiction stands rejected. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E. I Territorial jurisdiction

As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in Gurugram. In the present case, the project in question is situated within the planning area of Gurugram district. Therefore, this authority has complete territorial jurisdiction to deal with the present complaint.

E. II Subject matter jurisdiction

Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottee as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

Section 11(4)(a)

Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the

association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;

Section 34-Functions of the Authority:

34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.

So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

F. Findings on the objections raised by the respondent

F.I. Objection regarding entitlement of DPC on ground of complainants being investors.

15. The respondent is contending that the complainants have invested in the unit in question for commercial gains, i.e to earn income by way of rent and/ resale of the property at an appreciated value and to earn premium thereon. Since the investment has been made for commercial purpose therefore the complainants are not consumers but are investors, therefore, they are not entitled to the protection of the Act and thereby not entitled to file the complaint under section 31 of the Act. The respondent also submitted that the preamble of the Act states that the Act is enacted to protect the interest of consumers of the real estate sector. The authority

observes that the respondent is correct in stating that the Act is enacted to protect the interest of consumers of the real estate sector. It is settled principle of interpretation that preamble is an introduction of a statute and states main aims & objects of enacting a statute but at the same time, preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if it contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the apartment buyer's agreement, it is revealed that the complainants are buyers and paid total price of Rs. 29,64,415/- to the promoter towards purchase of an apartment in the project of the promoter. At this stage, it is important to stress upon the definition of term allottee under the Act, the same is reproduced below for ready reference:

"2(d) "allottee" in relation to a real estate project means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent;"

16. In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the apartment buyer's agreement executed between promoter and complainants, it is crystal clear that the complainant is an allottee(s) as the subject unit was allotted to her by the promoter. The concept of investor is not defined or referred in the Act. As per the definition given under section 2 of the Act,

there will be "promoter" and "allottee" and there cannot be a party having a status of "investor". The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal no. 0006000000010557 titled as *M/s Srushti Sangam Developers Pvt. Ltd. Vs. Sarvapriya Leasing (P) Lts. And anr.* has also held that the concept of investor is not defined or referred in the Act. Thus, the contention of promoter that the allottee being an investor is not entitled to protection of this Act also stands rejected.

F. II. Objection regarding the respondent is reiterating that the project is being delayed because of force majeure circumstances and contending to invoke the force majeure clause.

17. From the bare reading of the possession clause of the buyer developer agreement, it becomes very clear that the possession of the apartment was to be delivered by **December 2018**. The respondent in its contention pleaded the force majeure clause on the ground of Covid- 19, NGT orders, demonetisation, farmers protest etc. The High Court of Delhi in case no. *O.M.P (I) (COMM.) No. 88/2020 & I.As. 3696-3697/2020 title as M/S HALLIBURTON OFFSHORE SERVICES INC VS VEDANTA LIMITED & ANR. 29.05.2020* held that The past non-performance of the Contractor cannot be condoned due to the COVID-19 lockdown in March 2020 in India. The Contractor was in breach since September 2019. Opportunities were given to the Contractor to cure the same repeatedly. Despite the same, the Contractor could not complete the Project. The outbreak of a pandemic cannot be used as an excuse for

non-performance of a contract for which the deadlines were much before the outbreak itself. Now this means that the respondent/promoter has to complete the construction of the apartment/building by December 2019. It is clearly mentioned by the respondent/promoter for the same project, in complaint no. 2916 of 2020 (on page no. 28 of the reply) that only 42% of the physical progress has been completed in the project. The respondent/promoter has not given any reasonable explanation as to why the construction of the project is being delayed and why the possession has not been offered to the complainant/allottee by the promised/committed time. The lockdown due to pandemic in the country began on 25.03.2020. So, the contention of the respondent/promoter to invoke the force majeure clause is to be rejected as it is a well settled law that ***"No one can take benefit out of his own wrongs"***. Moreover, there is nothing on record to show that the project is near completion, or the developer applied for obtaining occupation certificate. Rather, it is evident from its submissions that the project is completed upto 42% and it may take some more time to get occupation certificate. Thus, in such a situation, the plea with regard to force majeure on ground of Covid-19 is not sustainable.

F. III. Objection regarding Timely payments:

The respondent has alleged that the complainants having breached the terms and conditions of the agreement and contract by defaulting in making timely payments. Further the above-mentioned contention is supported by the builder buyer agreement

executed between both the parties. Clause 24 provides that timely payments of the installments and other charges as stated in the schedule of payment is essence of the agreement.

But the respondent cannot take advantage of this objection of timely payments being himself at wrong firstly by still not obtaining the occupation certificate and offering the possession of the unit despite being delay of 3 years 26 days and the complainants have already paid more than 90% of the total sale consideration till date. Therefore, the respondent itself failed to complete its contractual and statutory obligations. Moreover, there is no document on file to support the contentions of the respondent regarding delay in timely payments.

G. Findings regarding relief sought by the complainants:

G.1 Direct the respondent to pay interest for delay possession charges at prevailing rate of interest.

Admissibility of delay possession charges:

18. In the present complaint, the complainants intend to continue with the project and is seeking delay possession charges as provided under the proviso to section 18(1) of the Act. Sec. 18(1) proviso reads as under:

Section 18: - Return of amount and compensation

If the promoter fails to complete or is unable to give possession of an apartment, plot or building, -

.....

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every

month of delay, till the handing over of the possession, at such rate as may be prescribed

19. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and the complainants not being in default under any provisions of this agreement and compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee(s) that even formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee(s) and the commitment date for handing over possession loses its meaning.
20. The buyer's agreement is a pivotal legal document which should ensure that the rights and liabilities of both builder(s)/promoter(s) and buyer(s)/allottee(s) are protected candidly. The apartment buyer's agreement lays down the terms that govern the sale of different kinds of properties like residentials, commercials etc. between the buyer and builder. It is in the interest of both the parties to have a well-drafted apartment buyer's agreement which would thereby protect the rights of both the builder and buyer in the unfortunate event of a dispute that may arise. It should be drafted in the simple and unambiguous language which may be understood by a common man with an ordinary educational background. It should contain a provision with regard to stipulated

time of delivery of possession of the apartment, plot or building, as the case may be and the right of the buyers/allottees in case of delay in possession of the unit. In pre-RERA period it was a general practice among the promoters/developers to invariably draft the terms of the apartment buyer's agreement in a manner that benefited only the promoters/developers. It had arbitrary, unilateral, and unclear clauses that either blatantly favoured the promoters/developers or gave them the benefit of doubt because of the total absence of clarity over the matter.

21. The authority has gone through the possession clause of the agreement. At the outset, it is relevant to comment on the pre-set possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and the complainants not being in default under any provisions of this agreements and in compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottees that even a single default by the allottees in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the apartment buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottees of their

right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottees are left with no option but to sign on the dotted lines.

22. **Admissibility of grace period:** The respondent promoter has proposed to handover the possession of the unit within a period of 36 months of signing of this agreement or within 36 months from the date of start of construction of the said building whichever is later. In the present case, the promoter is seeking 3 months' time as grace period. The grace period of 3 months is disallowed as no substantial evidence/documents have been placed on record to corroborate that any such event, circumstances, condition has occurred which may have hampered the construction work. Therefore, the due date of possession comes out to be 30.12.2018
23. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges however, proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under:

Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]

- (1) *For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the*

"interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.

Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.

24. The legislature in its wisdom in the subordinate legislation under the provision of rule 15 of the rules, has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.
25. Consequently, as per website of the State Bank of India i.e., <https://sbi.co.in>, the marginal cost of lending rate (in short, MCLR) as on date i.e., 25.01.2022 is @ 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.
26. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

"(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.

Explanation. — For the purpose of this clause—

- (i) *the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default.*
- (ii) *the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount*

or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"

Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., 9.30% by the respondent/promoter which is the same as is being granted to the complainant in case of delayed possession charges.

27. On consideration of the documents available on record and submissions made by both the parties, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 38 of the buyer's agreement executed between the parties on 30.12.2015, possession of the booked unit was to be delivered within 36 months of signing of this agreement or within 36 months from the date of start of construction of the said building whichever is later, since the date of signing of the agreement i.e. 30.12.2015 and the date of start of construction is 21.03.2014. Therefore, the due date is calculated from the date of signing of the agreement being later. Hence, the due date comes out to be 30.12.2018 as grace period of 3 months is disallowed. Copies of the same have been placed on record. The authority is of the considered view that there is delay on the part of the respondent to offer physical possession of the allotted unit to the complainant as per the terms and conditions of the buyer's agreement dated 30.12.2015 executed between the parties. It is the failure on part of the promoter to fulfil its obligations and

responsibilities as per the flat buyer's agreement dated 30.12.2015 to hand over the possession within the stipulated period.

28. Section 19(10) of the Act obligates the allottee to take possession of the subject unit within 2 months from the date of receipt of occupation certificate. In the present complaint, the occupation certificate was not granted by the competent authority till date and the respondent has not offered the possession of the subject unit. Therefore, in the interest of natural justice, the complainants should be given 2 months' time from the date of offer of possession. This 2 months' of reasonable time is being given to the complainants keeping in mind that even after intimation of possession practically he has to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit but this is subject to that the unit being handed over at the time of taking possession is in habitable condition. It is further clarified that the delay possession charges shall be payable from the due date of possession i.e. 30.12.2018 till actual handing over of possession or offer of possession (after obtaining OC from the competent authority) plus two months whichever is earlier.
29. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such the complainants are entitled to delay possession at prescribed rate of interest i.e. 9.30% p.a. w.e.f. 30.12.2018 till actual handing over of possession or offer of possession (after obtaining OC from the competent authority)

F.5 Direct the respondent to refrain from giving effect to unfair clauses unilaterally incorporated in buyer's agreement.

The complainants have not disclosed about the unfair clauses in the complaint. So, this relief can't be decided as well as the respondent is also directed not to charge anything which is not part of BBA.

H. Directions of the authority:

30. Hence, the authority hereby passes this order and issue the following directions under section 37 of the Act to ensure compliance of obligation cast upon the promoter as per the function entrusted to the authority under section 34(f) of the Act of 2016:

- i. The respondent is directed to pay the interest at the prescribed rate i.e. 9.30% per annum for every month of delay on the amount paid by the complainants from due date of possession i.e. 30.12.2018 till actual handing over of possession or offer of possession (after obtaining OC from the competent authority) plus two months whichever is earlier.
- ii. The arrears of interest accrued so far shall be paid to the complainants within 90 days from the date of this order as per rule 16(2) of the rules.
- iii. The complainants are directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.
- iv. The rate of interest chargeable from the complainants/allottees by the promoter, in case of default shall be charged at the prescribed rate i.e., 9.30% by the respondent/promoter which is the same rate of interest

which the promoter shall be liable to pay the allottee, in case of default i.e., the delay possession charges as per section 2(za) of the Act.

- v. The respondent is directed to provide the area calculation relating to super area, loading and carpet area to the complainants.
- vi. The respondent shall not charge anything from the complainants which is not the part of buyer's agreement.

31. Complaint stands disposed of.

32. File be consigned to registry.

v.l - g
(Vijay Kumar Goyal)
Member

[Signature]
(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 25.01.2022

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